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No. 08-1128

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JOHN K. BROAD, individually; and
DEVAN HENDERSON, individually,

Petitioners,

v.

GLEN WEIGEL and DAVID WEIGEL,
as Co-Personal Representatives of the
Estate of Bruce James Weigel, Deceased,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether under circumstances where the court below applied the appropriate legal standard for determining qualified immunity, including an analysis of both objective reasonableness and clearly established law, the petitioners' disagreement with the court's analysis of the facts in the light most favorable to the nonmoving party presents a compelling reason to grant a writ of certiorari.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iii
INTRODUCTION	1
PROCEDURAL BACKGROUND	3
FACTUAL BACKGROUND	9
REASONS FOR DENYING THE PETITION	9
I. The Decision Applied Proper Fourth Amendment Qualified Immunity Analysis As Applied By This Court in *Hope v. Pelzer* And by Every Other Circuit That Has Considered The Issue	10
II. The Decision Is Supported by Explicit Tenth Circuit Precedent in Accordance with this Court's Excessive Force Qualified Immunity Jurisprudence and by the Facts of the Case.	18
CONCLUSION	25

TABLE OF CITED AUTHORITIES

Page

CASES

Anderson v. City of Bessemer,
470 U.S. 564 (1985) 8, 9

Anderson v. Creighton,
483 U.S. 635 (1987) 10

Brousseau v. Haugen,
534 U.S. 194 (2004) 12, 22

Champion v. Outlook Nashville, Inc.,
380 F.3d 893 (6th Cir. 2004) 16

Cooter & Gell v. Hartmarx Corp.,
496 U.S. 384 (1990) 9

Cruz v. City of Laramie,
239 F.3d 1183 (10th Cir. 2001) ..... *passim*

Drummond ex rel. Drummond v. City of Anaheim,
343 F.3d 1052 (9th Cir. 2003) 16, 17

Foubert v. Lyons,
543 U.S. 1033 (2004) 12

Giannetti v. City of Stillwater,
216 F.App'x 756 (10th Cir. 2007) 21

Cited Authorities

Page

Graham v. Connor,
490 U.S. 386 (1989) ..... *passim*

Graver Mfg. Co. v. Linde Co.,
336 U.S. 271 (1949) 9

Groh v. Ramirez,
540 U.S. 551 (2004) 16

Gutierrez v. City of San Antonio,
139 F.3d 441 (5th Cir. 1998) 18

Hope v. Pelzer,
536 U.S. 730 (2002) ..... *passim*

Icicle Seafoods, Inc. v. Worthington,
475 U.S. 709 (1986) 9

Lyons v. City of Xenia,
417 F.3d 565 (6th Cir. 2005) 12, 13

Richman v. Sheahan,
512 F.3d 876 (7th Cir. 2008) 18

Sallenger v. Oakes,
473 F.3d 731 (7th Cir. 2007) 8

Scott v. Harris,
550 U.S. 372, 127 S. Ct. 1769 (2007) ..... *passim*

Cited Authorities

Page

Tanberg v. Sholtis,
401 F.3d 1151 (10th Cir. 2005) 17

Tennessee v. Garner,
471 U.S. 1 (1985) 10, 12, 20

United States v. United States Gypsum Co.,
333 U.S. 364 (1948) 8

Nike, Inc. v. Kasky,
539 U.S. 654 (2003) 24

Weigel v. Broad,
544 F.3d 1143 (10th Cir. 2008) 1

Wilkie v. Robbins,
551 U.S. 537, 127 S. Ct. 2588 (2007) 4

CONSTITUTION

U.S. Const. amend. IV 1, 19, 23

STATUTE

42 U.S.C. § 1983 (2006) 1, 23

Page

RULES

SUP. CT. R. 10 18

FED. R. CIV. P. 52(a) 8

FED. R. CIV. P. 54(b) 3

FED. R. CIV. P. 56 3

OTHER AUTHORITY

Stern, Gressman, Shapiro & Gellar, *Supreme Court Practice* § 4.18 (8th ed. 2002) 24

INTRODUCTION

Petitioners, John K. Broad and Devan Henderson, individually, ("petitioners") fail to present reasons justifying this Court's review on certiorari. While couching their argument in the proper terms, petitioners really only dispute the factual analysis reached by the Tenth Circuit and do not identify any real conflict with the law supporting the decision. In the final analysis, petitioners do little more than urge the Court to accept their version of disputed facts and ask the Court to disregard facts to the contrary.

PROCEDURAL BACKGROUND

Petitioners fail to justify certiorari review of the Tenth Circuit's decision, which analyzed only the claims against Officers Henderson and Broad. *Weigel v. Broad*, 544 F.3d 1143 (10th Cir. 2008); Pet. App. at 1a-22a. The Tenth Circuit followed this Court's precedent, its own precedent, and other circuits' precedent addressing 42 U.S.C. § 1983 (2006) qualified immunity issues. Moreover, the Tenth Circuit's decision was entirely consistent with Fourth Amendment qualified immunity jurisprudence throughout the circuits and, therefore, does not present a compelling issue worthy of a grant of certiorari. Respondents Glenn Weigel and David Weigel, ("Respondents") respectfully submit that the petition should be denied.

Petitioners allege a circuit split on application of *Hope v. Pelzer*, 536 U.S. (2002) and further state that the Tenth Circuit incorrectly applied the teachings of *Hope* and that the Tenth Circuit directly conflicted with

this Court's *Scott v. Harris*, 550 U.S. 372 (2007) and *Graham v. Connor*, 490 U.S. 386 (1989) cases, but analysis of these statements proves them incorrect. Petitioners make several ill-supported statements that the Tenth Circuit's decision conflicts with decisions of other circuits. However, petitioners use overly generalized terms and fail to cite a single case with a substantively similar factual pattern that conflicts with the present case. Instead, in an attempt to manufacture a conflict, petitioners cite cases that are wholly distinguishable on both their facts and legal analysis. In the end, petitioners simply resort to making the same factually incorrect arguments as they made below.

The Tenth Circuit denied en banc review in this case. Pet. App. at 97a-98a. Petitioners' reliance on the dissenting opinion in the case below fails because, much like petitioners' arguments to this Court, the dissent went beyond the applicable standard of review and relied on "enriched" facts to support its desired reasonableness determination and even made an "admission" about describing the facts "as I see them." Pet. App. at 25a; 59a. In short, the dissent employed the very 20/20 hindsight proscribed by this Court and reviewed the undisputed facts in a light most favorable to the law enforcement officers contrary to summary judgment requisites. Review of the facts of this case under the proper standards, as conducted by the District Court and the Tenth Circuit Court of Appeals, reveals that the denial of summary judgment on the qualified immunity defense proves correct.

FACTUAL BACKGROUND

Petitioners present a one-sided view of the facts of this case, and now urge review on certiorari because they do not agree with the way the courts below analyzed the facts in determining the qualified immunity motion. Respondents' underlying briefing in this matter cited detailed facts of record and described, as best as possible, events leading to Bruce Weigel's death, which resulted in a three-volume appendix further supplemented by the cross-appellants' supplemental appendix volume. Petitioners grossly misstate the record and disingenuously describe facts that do not fairly or fully inform this Court or represent the record on appeal.

Reference to the District Court's ruling in this case (from which the Federal Rules of Civil Procedure Rule 54(b) certification providing interlocutory review of a *grant* of summary judgment based on qualified immunity derives), with consideration of the applicable de novo standard of review of this summary judgment, pursuant to Federal Rules of Civil Procedure Rule 56, highlights the unwarranted nature of certiorari review:

> Taking the facts in a light most favorable to the Plaintiffs, it becomes clear that, on the facts alleged, there was a Constitutional violation. *See Saucier*, 533 U.S. at 201. As alleged, Weigel was in custody at the time of his death. Weigel's death arguably came as a result of the pressure that was applied to his upper torso after he was subdued, and no longer a threat. He was in a prone position,

> and handcuffed. Indeed, some evidence suggests that his legs were bound together. The evidence also suggests that the encounter had become stabilized to the point that one of the Troopers left Weigel and went to his vehicle to warm his hands — it is easily inferred that Trooper Henderson would not have left Trooper Broad had he thought Weigel still posed a credible threat to his safety. Furthermore, during the entire time Weigel was handcuffed and face down in the barrow ditch, he had the weight of at least one grown man on his upper torso. As alleged, Weigel had the weight of at least two grown men on his upper torso while face down and handcuffed.
>
> Taken from the perspective of an objectively reasonable police officer on the scene, we believe that continuously applying pressure to Weigel's back was excessive and unreasonable. An objectively reasonable police officer on the scene would not have continued to apply pressure to Weigel's upper torso, thereby denying him oxygen, after he was subdued and no longer a threat.

Pet. App. at 82a-83a. The district court thus found a constitutional violation, but did not find that the law was clearly established under *Cruz v. City of Laramie*, 239 F.3d 1183 (10th Cir. 2001). *Id.* at 89a.

At 7:50 a.m. on December 20, 2002, Trooper Broad radioed dispatch regarding the accident that precipitated the events culminating in Bruce Weigel's death. Pet. App. at 4a. Bruce Weigel had explained to the troopers that he had "believed his vehicle's steering linkage had come loose or broken." *Id.* Like the District Court, the Tenth Circuit decision also carefully outlined what the evidence shows happened from that time forward, *id.* at 3a-9a, including the call to dispatch at 7:57 reporting that the situation had subsided and was "diffused." *See id.* at 8a.

At 8:00:51 a.m., dispatch received another call reporting Bruce Weigel's full cardiac arrest. *Id.* at 8a. The call log demonstrates *over three minutes* elapsed from the report that the situation had subsided and was diffused until the report that Weigel was in full arrest. *Id.* The troopers were unable to immediately perform resuscitation efforts because they could not find a CPR mask until another officer had arrived at the scene. *Id.*

The troopers' own actions and statements prove critical to the Tenth Circuit's objective reasonableness analysis — an analysis misconstrued and criticized by the petitioners. Trooper Broad testified that had he been uncomfortable with Trooper Henderson leaving for his gloves, he would have told Henderson not to leave. In fact, the decision is supported by the admission of a party opponent, which petitioners altogether ignore:

> In his initial report to a police investigator, Trooper Henderson indicated that Mr. Weigel was *subdued* before he left him. "Trooper Henderson said the driver was laying on his

stomach with his head turned to the side, legs straight out and just quit struggling . . . . Trooper Henderson went to his patrol vehicle to radio for additional assistance and obtain his coat and gloves." In his deposition account of the event, Trooper Henderson *testified* he would not have returned to his vehicle "[i]f Mr. Weigel posed a safety risk to the safety of [him] or the other witnesses standing around or Trooper Broad." He further stated he "felt *confident* with the witnesses around [Mr. Weigel] that if the suspect tried to get up that they would keep him down. . ." When Trooper Broad was asked in his deposition, "[D]id you feel comfortable that you could control [Mr. Weigel] without Mr. Henderson," he replied, "I think I did with the witnesses still holding down his lower body."

One witness testified that Mr. Weigel ceased to struggle at one or two points throughout the event. [Citation omitted] ("[T]here was one, what I recall sort of a major time when [Mr. Weigel] quit struggling and then the situation seemed to be completely [diffused], . . . and then he started to try to get up and move around again, and that's when the officer said don't struggle, don't get up."). The witness viewed the situation as *under control* when Trooper Henderson went back to his car. When Trooper Broad was asked how long Mr. Weigel struggled before he completely stopped, he responded: "Oh, after he was handcuffed? I don't now. A minute, minute and a half."

> Trooper Henderson estimated his vehicle was approximately twenty feet from Mr. Weigel, Trooper Broad, and Mr. Stickley. While in the car, Trooper Henderson shut the door, turned on his heater, and warmed his hands. One witness testified Trooper Henderson made a radio call while in his vehicle. While dispatch records show a person at the scene radioed dispatch at 7:57 a.m. with information that the *struggle had subsided*, Trooper Henderson *does not remember* making this call.

Pet. App. at 7a-8a (footnote and citations omitted and emphasis added). Despite this evidence, petitioners feel free to rewrite the facts in their briefing, *see id.* at 3 ("Bruce Weigel inexplicably rear-ended Trooper Broad's vehicle" and "a ten minute life and death struggle ensued"); *id.* at 4 ("continued to struggle" after handcuffing and three people holding him down); *id.* at 5 ("still struggling after being handcuffed" and "suddenly stopped struggling" and "ten minute battle"); *id.* at 16 ("rapidly evolving situation where, just moments before the allegedly excessive force was used, the Troopers were engaged in a life-and-death struggle"); *id.* at 17 ("non-compliant detainee, like Weigel,"); *id.* at 19 ("rapidly evolving situation" and "resistant Weigel"); *id.* at 23 ("the threat that Weigel continued to present" and "still struggling Weigel"); *id.* at 25 ("Weigel was still struggling"); *id.* at 26 ("Weigel's continued struggling" and "tense, rapidly evolving situation") in an effort at securing certiorari review of this interlocutory appeal.

Petitioners' statements defy the record evidence and ignore the facts that informed both the District Court's and the Tenth Circuit's objective reasonableness analyses. Neither reviewing court could ignore the common-sense inference that no reasonable trooper would leave a fellow trooper in the midst of a continuing-to-escalate, violent and ongoing struggle with a suspect, ostensibly a danger to bystanders and oncoming Interstate traffic, to call to dispatch, warm his hands, and get gloves before returning minutes later. *See Sallenger v. Oakes*, 473 F.3d 731, 740 (7th Cir. 2007) (noting the officer's departure from struggle raised question of fact regarding degree of control over subject after he has handcuffed and footnoting, at 742, *Cruz* in finding the unlawfulness of the excessive force used in hobbling the compliant decedent clearly established). Contrary to petitioners' assertions, the Tenth Circuit did not abandon its role as gatekeeper in qualified immunity determinations. The same record evidence and the same facts demonstrate that certiorari review is unnecessary in this case.

Findings of fact by a district court in a civil case may not be set aside unless they are clearly erroneous. Fed. R. Civ. P. 52(a). A finding is clearly erroneous if the reviewing court is left with the definite and firm conviction based on all the evidence that the lower court made a mistake. *See United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). If the district court's finding, and the Tenth Circuit's finding upholding the district court's constitutional violation determination is plausible in light of all the evidence, *see Anderson v. City of Bessemer*, 470 U.S. 564, 574 (1985), or falls within a broad range of permissible

conclusions, *see Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 400 (1990), this Court may not reverse even if it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. *See Anderson*, 470 U.S. at 575.

Even a cursory review of the factual differences set forth between Respondents' and petitioners' versions of events, viewed in the light most favorable to Respondents, shows that neither the District Court nor the Tenth Circuit made mistakes regarding the facts. This Court has often held that "a court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949) (citing cases). This Court does not make its own findings of fact. *See Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 713-13 (1986).

REASONS FOR DENYING THE PETITON

The petitioners' request that this Court step in at this early stage in the proceedings is fundamentally misguided. Petitioners' assertion that the Tenth Circuit misapplied this Court's precedent and that a conflict exists among the circuits is incorrect upon even cursory review of the facts at issue in this and each cited case. In the absence of a conflict the issue is merely one of application of this Court's excessive force qualified immunity precedent to a unique set of facts. Review of the factbound determination is unwarranted.

I. The Decision Applied Proper Fourth Amendment Qualified Immunity Analysis As Applied By This Court in *Hope v. Pelzer* And by Every Other Circuit That Has Considered The Issue.

The contours of Bruce Weigel's Fourth Amendment rights were sufficiently clear that reasonable officers would have known their conduct violated those rights. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Deadly force was unjustified once Weigel was lying prone on the ground with his arms handcuffed behind him. *See Tennessee v. Garner*, 471 U.S. 1, 11 (1985) (ruling that deadly force is justified only where the officer "has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or others."). There is no requirement that a § 1983 civil rights plaintiff demonstrate the existence of a "fundamentally similar" or even a "materially similar" case. *See Hope*, 536 U.S. at 741. Rather, "notable factual distinctions between the precedents . . . relied upon" are acceptable where "prior decisions give reasonable warning that the conduct then at issue violated constitutional rights." *Id.* General statements of the law or a general constitutional rule "may apply with obvious clarity to the specific conduct in question." *Id.* at 741.

The Tenth Circuit properly applied the *Hope* obviousness exception to the facts of this case. *See* Pet. App. at 19a. The facts of each case need not be identical to implicate clearly established law regarding constitutional rights:

> For a constitutional right to be clearly established, its contours must be sufficiently

> clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of preexisting law the unlawfulness must be apparent.

Hope, 536 U.S. at 739; *accord Cruz*, 239 F.3d at 1187. In *Cruz*, the court defined the constitutional limitations on restraining a subject exhibiting diminished mental capacity by prohibiting the use of a hog-tie restraint and mandating "the use of *less restrictive* means for physical restraint." *Id.* at 1188 (emphasis added). It is undisputed that the type of force employed by the troopers in this case was more restrictive than a hog-tie restraint because the compression restraint here restricted Weigel's ability to breathe by active application of downward force that compressed his ribs and prohibited him from taking a breath. At various times, Weigel had up to three persons on top of him, and at minimum one 160 pound officer pushing down on his upper body. Rather than suffocating under his own weight as with a hog-tie restraint, Weigel succumbed to pressure that was extreme enough to break his ribs. The independent pathologist who conducted the initial autopsy, Dr. Stephen Cina, concluded that Weigel's death was due to mechanical asphyxiation due to weight applied to his back and described the death as a homicide. The degree of specificity from prior case law lessens in relationship to more egregious conduct in light of constitutional principles. *See Robbins v. Wilkie*, 551 U.S. 537, 127 S. Ct. at 2618 (Ginsburg, J., dissenting).

Review of the facts of this case illustrates obviously egregious conduct, consistent with the teachings of *Hope*, that constituted excessive force.

Petitioners cite decisions from the Sixth and Eleventh Circuits as properly applying this Court's "obviousness" rule from the *Hope* case; however, each differs too greatly on its facts to apply to this case. The Sixth Circuit analyzed *Brosseau v. Haugen*, 543 U.S. 194 (2004), and described that "[q]ualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted." *Lyons v. City of Xenia*, 417 F.3d 565, 578-79 (6th Cir. 2005) (after remand *sub nom. Foubert v. Lyons*, 543 U.S. 1033 (2004)). Then, the court found, even accepting all of the plaintiff's factual allegations as true, nothing "obvious" under *Hope* that the "general [excessive-force] tests set out in *Garner* and *Graham* . . . can 'clearly establish' . . . even without a body of relevant case law" about what the officer should have done. 417 F.3d at 579 (quoting *Brousseau*, 125 S. Ct. at 599). Thus, the court found that facts including entering a house from which a fellow officer had just placed a distressed call for backup help and seeing immediately that the officer and resident were in close proximity to each other and in the middle of a confrontation sufficed for purposes of granting the officer qualified immunity. *Id.* The Eleventh Circuit analyzed *Hope*, and described that obviousness required "fair and clear warning" of the conduct's unlawfulness. *Thomas ex rel. Thomas v. Roberts*, 323 F.3 950, 953 (11th Cir. 2003) (after remand *sub nom. Thomas v. Roberts*, 536 U.S. 953 (2002)). The court next found nothing "egregious" under *Hope* in

regard to the challenged strip searches of children at issue in that case. *Id.* at 956 ("*Hope* admonishes us to be less rigid when evaluating caselaw to determine whether a public official had fair warning that his actions would be unlawful. . . . The [cited] cases . . . involve facts that are quite different from the circumstances presented here"). Unlike *City of Xenia* or *Thomas*, here, the *Cruz* case in 2002 gave law enforcement fair and clear warning that the deadly force used here, after a suspect is in custody, would be unlawful. Furthermore, the deadly force against Weigel rose to a level so egregious as to alert the officials that such conduct is unconstitutional even without caselaw. Nothing in the facts present in *Lyons* or *Thomas* compares to the facts in the present case where the threat had subsided.

The Tenth Circuit properly applied this Court's qualified immunity objective reasonableness standards in light of the facts evaluated under the totality of circumstances precedent, including *Graham*. 490 U.S. at 396-97. The opinion concluded: 1) "there is evidence a reasonable officer would have known that the pressure placed on Mr. Weigel's upper back as he lay on his stomach created a significant risk of asphyxiation and death" and 2) "there is evidence that Mr. Weigel was subjected to such pressure for a significant period after it was clear that the pressure was unnecessary to restrain him." Pet. App. at 14a-15a. Nothing in the decision conflicts with this Court's teachings or conflicts with prior decisions of the Tenth Circuit or of any other circuit. The decision is firmly rooted in evidentiary findings and does not "elevate[ ] a generalized proposition to a status of clearly established law without regard to the particularized facts of the case and without

prior case law giving officers fair warning" as petitioners assert. Pet. at 1.

Petitioners argue as a basis for this Court's review that the Tenth Circuit failed to reach the correct evidentiary findings, not based on the appellate record, but based on petitioners' unwillingness to confront the facts (and wholesale omission of such facts from their Petition) that the situation was *diffused* and the imminent danger had *subsided*. The decision, therefore, does not warrant this Court's review.

Precedent regarding excessive force, including deadly force, stems from the generalized teachings of *Graham*, and the Tenth Circuit properly applied this precedent to the particularized facts at hand. In 2002, when the troopers seized Weigel and restrained him with the weight of their bodies on his back, there were cases on point about positional asphyxia and sudden custody death syndrome. The troopers had been trained in the risks of this type of restraint and had notice that it could result in death. The troopers had been trained in the proper procedure to follow after an individual has been handcuffed. In the Tenth Circuit, the *Cruz* case put the petitioners on fair notice that their actions were unlawful. 239 F.3d 1183. Diminished capacity as a positional asphyxia or sudden custody death syndrome factor existed in *Cruz*, 239 F.3d at 1188, and also existed in this case as witnesses "generally described Mr. Weigel's behavior as 'strange,' 'bizarre,' 'odd,'" Pet. App. at 5a, and, thus, "[h]is apparent intoxication, bizarre behavior and vigorous struggle made him a strong candidate for positional asphyxia." *Id.* at 14a. The decision explained how the Tenth Circuit made clear in

Cruz that "similar future conduct was prohibited[,]" *id.* at 18a, and "[w]e do not think it requires a court decision with identical facts to establish clearly that it is unreasonable to use deadly force when the force is totally unnecessary to restrain a suspect or to protect officers, the public, or the suspect himself." *Id.* at 19a. The Tenth Circuit thus concluded: "Because it is clearly established law that deadly force cannot be used when it is unnecessary to restrain a suspect or secure the safety of officers, the public, or the suspect himself, the defendants' unnecessary use of deadly force violated clearly established law." *Id.* at 20a. A memorandum discussing the *Cruz* case was distributed statewide in order to educate law enforcement and to prevent more deaths from positional asphyxia or sudden custody death syndrome; indeed, the troopers were aware of the *Cruz* decision. *See id.* These fundamental deadly force tenets coupled with an objective reasonableness inquiry into the facts in the entire record support the decision and negate any perceived necessity for certiorari review.

The Tenth Circuit's determination that the law against excessive force such as that used by the troopers was clearly established properly took into consideration training materials relating to positional asphyxia; however, the court did not rely exclusively on the training materials in reaching its decision that the law was clearly established as petitioners suggest. The Tenth Circuit ultimately relied on the teachings of its prior *Cruz* case as illustrated by the training materials. The *Cruz* court discussed the dangers of "positional asphyxia" recognizing "legally related" literature available to law enforcement personnel discussing "sudden custody death syndrome." *Cruz*, 239 F.3d at 1189.

This Court's decision in *Groh v. Ramirez* further illustrates the propriety in the Tenth Circuit's reasoning, namely by underscoring and personalizing the fair warning requirement. 540 U.S. 551, 564 & n.7 (2004) (analyzing officer's employers' internal guideline only to "underscore" that the officer was on notice of the unlawfulness of his conduct not to "suggest that an official is deprived of qualified immunity whenever he violates an internal guideline"). Additionally, this Court in *Hope* relied on state prison regulations and communications with the United States Department of Justice as evidence that placed requirements on the punitive use of a hitching post in determining the law was clearly established and proscribed. 536 U.S. at 743-44.

Likewise, in *Champion*, the Sixth Circuit relied, in part, on the officers' training as clearly proscribing a particular use of force. 380 F.3d at 903. In *Drummond*, the Ninth Circuit relied, in part, on training materials and recent publicity about similar instances of asphyxiation. 343 F.3d at 1057. While *Champion* and *Drummond* postdated Weigel's death, both cases relied on cases decided before his death. Indeed, the *Drummond* court noted: "The compression asphyxia that resulted appears with unfortunate frequency in the reported decisions of the federal courts, and presumably occurs with even greater frequency on the street." 343 F.3d at 1063. In addition to Tenth Circuit authority, the legal precedent from other jurisdictions and the abundance of legally related literature addressing excessive force, positional asphyxia, and sudden custody death syndrome overwhelmingly established Weigel's right to be free from the deadly force employed by the

troopers in this case. In this case too, the training materials, in part, supported a finding that Weigel's right to be free from weight applied to his back after he was handcuffed and compliant was clearly established.

Merely because the decision referred to the troopers' training does not vitiate the existence of published Circuit precedent, the *Cruz* case, which shows the law prohibiting the petitioners' actions was clearly established at the time of Bruce Weigel's death. The technique actually employed by the troopers — following the publication of the *Cruz* decision — was known to cause asphyxia. *Cruz* clearly established Weigel's constitutional right to be free from this type of deadly force during restraint.

Moreover, the training materials in the present case differ from the departmental policy in *Tanberg v. Sholtis*, 401 F.3d 1151 (10th Cir. 2005) because the materials encompassed the precise case, *Cruz*, from the same circuit clearly established the law and informed the determination precluding qualified immunity. The training materials, with specific reference to circuit law, show that the petitioners had knowledge or fair warning that their actions violated Bruce Weigel's Fourth Amendment rights.

Certiorari review proves wholly improper to harmonize the Tenth Circuit's decision (as well as the Ninth Circuit's decision in *Drummond*) with this Court's decisions in *Scott* or *Graham*, which petitioners cite to further manufacture a purported conflict. The decision comports with this Court's precedent and Tenth Circuit precedent (*Cruz*) and need not factually square with all

other cases. In fact, the Fifth and Seventh Circuits have also rendered decisions supporting Respondents' position, see *Gutierrez v. City of San Antonio*, 139 F.3d 441 (5th Cir. 1998) (noting that substantial evidence existed at that time of the dangers of positional asphyxia; "San Diego mailed copies of San Diego Study to police departments around the nation") and *Richman v. Sheahan*, 512 F.3d 876 (7th Cir. 2008) (dealing with a 1997 restraint hypoxia death ("[f]rom the effort of the first two deputies to seize Richman to his death, only seven minutes elapsed") and citing *Cruz* to support its conclusion that a reasonable jury could find that the deputies used excessive force because the legal standard governing excessive-force claims is well established). These cases debunk the conflict and misapplication of *Hope* urged by petitioners and show that cases have different outcomes due to different facts and are not subject to the bright-line rules petitioners selectively forward.

II. The Decision Is Supported by Explicit Tenth Circuit Precedent in Accordance with this Court's Excessive Force Qualified Immunity Jurisprudence and by the Facts of the Case.

Under this Court's Rule 10, the Tenth Circuit's application of the "properly stated rule of law" of *Graham v. Connor* to the particular allegations of Respondents' complaint is not a question worthy of a grant of certiorari. Petitioners' contrary claim that this factbound and interlocutory ruling merits review by this Court rests principally on the contention that it conflicts with the holdings of this Court and of other circuits. Review of the decisions petitioners cite, however, reveals

no break from this Court's teachings and only an illusory circuit conflict as described above.

Fourth Amendment qualified immunity precedent and facts in the record support the Tenth Circuit decision. Furthermore, the decision explicitly recognized the procedural posture of this case when it stated:

> We recognize the events leading up to Mr. Weigel's death happened quickly. We further acknowledge that, up to a point, the troopers were protecting themselves and the public from Mr. Weigel and Mr. Weigel from himself. But we are not addressing split second decisions by law enforcement officers to protect themselves and the public. Nor are we stating that the troopers necessarily acted unreasonably. If, however, the facts plaintiffs proffered are true and the jury draws the inferences most supportive of plaintiffs' position, then the law was clearly established that applying pressure to Mr. Weigel's upper back, once he was handcuffed and his legs restrained, was constitutionally unreasonable due to the significant risk of positional asphyxiation associated with such actions. We said this overtly, if not by strong and deducible inference, in *Cruz*. Moreover, cases from other circuits have stated it is "clearly established that putting substantial or significant pressure on a suspect's back while that suspect is in a face-down prone position after being subdued and/or incapacitated constitutes excessive force." [Citations

> omitted] In these circumstances, defendants are not entitled to qualified immunity at this stage of the proceedings.

Pet. App. at 20a-21a. While petitioners may disagree with the decision, qualified immunity is just that – qualified. Officers will not always obtain the protection of this affirmative defense. The facts of this case dictate that it must now proceed to trial to allow a jury hear and decide whether the troopers acted reasonably in light of the circumstances they faced. This case simply does not present the precedential disregard or portend the sea change in qualified immunity analysis the petitioners would have the Court believe.

In effort to garner support for certiorari review, petitioners argue the decision "directly conflicts with this Court's decision in *Scott v. Harris*." Pet. at 8. This is not the case. And, as with any motion for summary judgment, this Court, in *Scott*, instructed: "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts[.]" *Scott*, 127 S. Ct. at 1776. The Tenth Circuit applied this Court's qualified immunity objective reasonableness precedent, including *Graham*, 490 U.S. at 396-97, as informed by the "totality of the circumstances," *Garner*, 471 U.S. at 8-9, to the situation and found "evidence that for three minutes the troopers subjected Mr. Weigel to force that they knew was unnecessary to restrain him and that a reasonable officer would have known presented a significant danger of asphyxiation and death. If true, this constitutes an unreasonable use of force under the

Fourth Amendment." Pet. App. at 16a. The Tenth Circuit did not incorrectly apply the deadly force analysis from *Garner*, which petitioners state that this Court rejected in *Scott*. The decision rather painstakingly examined the factual record and agreed with evidence — including an explicit admission from one of the petitioners involved — that the imminent danger to the officers and the public had subsided once Weigel was subdued.

The Tenth Circuit's decision *Giannetti v. City of Stillwater*, 216 F.App'x 756 (10th Cir. 2007) (unpublished), also a positional asphyxia case, further fails to support petitioners' arguments against training materials because the relevant facts in *Giannetti* differ significantly in important details because, as this Court found in *Scott*, the *Giannetti* court found a continuing threat that never subsided. *Id.* at 765. Unlike the present case, no record evidence supported that the encounter in *Giannetti* ever subsided or diffused: "the uncontroverted testimony is that the decedent's actions caused the struggle to escalate. . . . once prone and on the ground, [she] continued to struggle and kick the officers." *Id.* Thus, the court found "we cannot conclude that the officers used excessive force given the 'tense, uncertain, and rapidly evolving' situation presented by Ms. Giannetti's behavior." *Id.* As described in the decision and the factual background set forth above, there is record evidence in the present case showing that the situation was diffused when the troopers applied an unreasonable use of force under the Fourth Amendment. Therefore, facts, which at the surface seem similar, upon further inquiry into the record are not.

The patently distinguishable facts thoroughly analyzed in the Tenth Circuit decision differentiate it from this Court's decision in *Scott*, with which petitioners allege a conflict. Petitioners attempt to shoehorn the present case within the factual confines and, thus, legal purview of the *Scott* decision, but the facts differ too greatly. The *Scott* case involved a high speed car chase, caught entirely on videotape, that never subsided or diffused, until the officer, who had radioed in for permission to execute the maneuver, ended the chase by using a tactic, which could have, but did not, kill the driver. *Id.* at 1773. This Court held: "The car chase that respondent initiated in this case posed a substantial and immediate risk of serious physical injury to others; no reasonable jury could conclude otherwise. Scott's attempt to terminate the chase by forcing respondent off the road was reasonable." *Id.* at 1779. In *Scott*, based upon the unique facts, this Court analyzed the objective reasonableness of the officer's conduct as required by *Graham*. *Id.* at 1776. The Tenth Circuit also analyzed this case under the test set forth in *Graham*, in conformance with *Scott*, but properly reached a different conclusion as to the reasonableness of the conduct due to different facts.

Likewise, the facts of this case differentiate it from *Brousseau v. Haugen*, 543 U.S. 194 (2004). Petitioners, like the dissenting opinion, must ignore the real facts of this case, and turn the standard of review on its head and view the facts in the light most favorable to the troopers in order to equate this case to the situation in *Brousseau*. In *Brousseau*, the situation the officer confronted was "whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when

persons in the immediate area are at risk from that flight." *Brousseau*, 543 U.S. at 200.

Ultimately, petitioners' own arguments illustrate Respondents' position that the underlying decision comports with this Court's precedent: "the relevant inquiry under *Scott* is whether Trooper Broad's responses were reasonable when weighed against the threats that Mr. Weigel continued to pose to himself, the officers, and others." Pet. at 8. The objective reasonableness under the totality of the circumstances test, applied to the record evidence in this case, shows that the force Trooper Broad continued to use after subduing Mr. Weigel was objectively unreasonable because no continuing threat existed as did in the *Scott* high-speed car chase or the *Brousseau* vehicular flight.

Established qualified immunity analysis necessarily requires particularized review of the attendant facts in each case. However, this process does not require uniform holdings when factual review dictates otherwise. *See Scott*, 127 S. Ct. at 1778 ("in the end we must still slosh our way through the factbound morass of 'reasonableness.'"). The Tenth Circuit looked at the facts before it in finding the Fourth Amendment violation actionable under 42 U.S.C. § 1983.

In sum, petitioners attack the Tenth Circuit's application of Fourth Amendment objective reasonableness principles, but such application was based on record facts that petitioners ignore in making their arguments, but the courts below could not. Petitioners simply do not like the factual conclusions reached after review of all of the evidence and wish this

Court to overturn the factual findings made below. This is not the proper purpose of certiorari review, which proves wholly improper to harmonize the Tenth Circuit's decision with this Court's decisions in *Scott* or *Graham*, which petitioners cite to further manufacture a purported conflict. The decision comports with this Court's precedent and Tenth Circuit precedent (*Cruz*) and need not factually square with all other cases.

Finally, even if the Court were interested in addressing whether and under what circumstances excessive force utilized by law enforcement merit qualified immunity, the interlocutory posture of this case would make it a poor choice as a vehicle for deciding such issue. Proceedings on remand could yet obviate the need to address the objective reasonableness test altogether if Respondents do not succeed in proving their case. More importantly, even positing (as we do) that Respondents will be able to prove the allegations of their complaint, a more developed factual record disclosing exactly what the excessive force was in the circumstances of this case would contribute to a more informed decision in a concrete factual setting. This case is, therefore, an obvious candidate for application of this Court's normal practice of not granting certiorari to review an interlocutory ruling of a federal court of appeals. *See* Stern, Gressman, Shapiro & Gellar, *Supreme Court Practice* § 4.18, at 258 (8th ed. 2002). Without more development in the court below, the Tenth Circuit's ruling in this case is still too preliminary for certiorari "given the interlocutory posture of this case." *Nike, Inc. v. Kasky*, 539 U.S. 654, 659 (2003).

The cases cited from this Court, and the circuits, do not assist Petitioners. The facts and the law support the Tenth Circuit's decision. Petitioners fail to satisfy their burden to justify this Court's review on certiorari and their petition should be denied.

CONCLUSION

Despite petitioners' best efforts to obfuscate the facts of this case and to restrict courts' ability to properly analyze the objective reasonableness test and expand wholesale qualified immunity for law enforcement, no issue worthy of this Court's review can be teased out of this case. The Tenth Circuit's holding denying the troopers qualified immunity properly applied both *Hope* and *Graham* to the facts of this case and in no way departed from or conflicted with any of this Court's precedent. No real circuit split exists; and this appeal is in any event interlocutory in nature. Petitioners' clearly established law/ training materials argument simply reflects a basic misunderstanding of civil rights excessive force qualified immunity law. For all of the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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